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No. 83-1919

In the Supreme Court of the United States

OCTOBER TERM, 1984

THE CITY OF OKLAHOMA CITY,
Petitioner,

v.

ROSE MARIE TUTTLE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a single isolated incident of the use of excessive force by a police officer establishes an official policy or custom of a municipality sufficient to render the municipality liable in damages under 42 U.S.C. §1983.*

*This is the question recited in the Petition for Writ of Certiorari and the Brief for Petitioners. We urge at pages 38-39 of this brief that this question is not in fact presented by this case.

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BRIEF FOR RESPONDENT

RULES INVOLVED

Rule 51, Federal Rules of Civil Procedure, provides in pertinent part:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

Rule 401, Federal Rules of Evidence, provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

STATEMENT OF THE CASE

(1) The Killing of William Tuttle

Although many details of the events leading to this litigation were the subject of sharply conflicting trial testimony, certain basic facts are not in controversy. On October 4, 1980, the Oklahoma City Police received a telephone call reporting that an armed robbery was in progress at a bar known as the We'll Do Club. The caller, laughed during the report, and described the alleged robber as a 37-year-old white male with brown hair and glasses. The dispatcher radioed the report to police cars in the vicinity of the Club. The first car to arrive at the scene was driven by Police Officer Julian Rotramel, a rookie officer who nad completed the police academy only ten months earlier. Although rookie patrolmen less than a year out of the academy frequently rode with experienced senior officers, Rotramel had been assigned to patrol on his own. When Rotramel arrived at the bar a second backup car, driven by an experienced officer, was less than a minute away. Rotramel chose, however, not to await the imminent arrival of a backup unit; he parked his patrol car directly in front of the bar and entered it alone.

No robbery was in progress, threatened, or had in fact occurred at the bar. Whether or not Rotramel was actually told this when he was in the bar is among the issues that were disputed at trial. In any event, shortly after Rotramel entered the bar, he was approached by William Tuttle. Because Tuttle matched the description of the alleged robber, Rotramel directed Tuttle to remain in the bar. Tuttle initially complied, but then left the bar through the same door

by which Rotramel had entered. Rotramel followed Tuttle out of the bar, drawing his service revolver as he left. Outside the bar Rotramel observed Tuttle approximately ten feet away. Tuttle had his back to Rotramel, and was in a crouched position. Rotramel fired his service revolver, hitting Tuttle in the back.

When Rotramel shot Tuttle, another officer, Riley Lennox, had already arrived at the bar, but was on another side of the building out of sight of the shooting. Lennox hurried to the scene of the shooting, and was directed by Rotramel to search the boots of Mr. Tuttle, who lay dying on the sidewalk. Lennox conducted a search of the boots, but found nothing. Tuttle's wife, who had had a baby only 5 days earlier, was called to the scene, but was not permitted to see or talk to her husband. Tuttle was taken by ambulance to a local hospital, in the custody of several police officers. At the hospital a nurse who was treating Tuttle removed his boots, and this time a toy plastic cap pistol fell out. Tuttle died shortly after arriving at the hospital. (J.A. 63-64).

It is undisputed that Tuttle was neither an armed robber nor chargeable with any other felony. Similarly, all parties agree that Tuttle in fact never had a gun or any other type of dangerous weapon. Tuttle never made any verbal threats to Rotramel and never posed any actual danger to Rotramel, Lennox, or any other officer or civilian. The most serious offense with which Tuttle could have been charged was leaving the custody of officer Rotramel, a misdemeanor for which the maximum penalty is a $35 fine.

(2) Proceedings in the District Court

Respondent Rose Marie Tuttle, William Tuttle's widow, commenced this action in the United States District Court for the Western District of Oklahoma. Her complaint was brought pursuant to sections 1983, 1985, 1986 and 1988 of 42 U.S.C., and directly under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution. See *Bivens* v. *Six Unknown Federal Narcotics Agents*,[1] 403 U.S. 388 (1971). Jurisdiction was based on 28 U.S.C. §§ 1331, 1343, and 1391(b). The complaint named as defendants both officer Rotramel and the City of Oklahoma City. Respondent alleged that in killing Tuttle, Rotramel "was acting pursuant to the orders and directives" of the city (J.A. 15), and that the city had "inadequately trained" its police officers. (J.A. 16). Respondent sought compensatory and punitive damages, as well as an award of costs and counsel fees. (J.A. 20-21).

In the trial court both the city and officer Rotramel[2] were represented by the City Attorney of Oklahoma City. The nature of the defense adduced at trial is of considerable importance because it is very different from the contentions now advanced by the city. In this Court the city insists that

[1] Neither court below considered whether the peculiar requirements of *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1958), rooted as they are in the particular legislative history of the 1871 Civil Rights Act, are applicable to an action brought directly under the Constitution. Should this Court hold that the decision of the Tenth Circuit cannot be upheld under *Monell*, the question of what impact *Monell* has on a *Bivens* action should be remanded for consideration in the first instance by the court of appeals

[2] By the time this action came to trial Rotramel was no longer on the police force.

"the act of Rotramel in discharging his service revolver and thereby causing the death of William Tuttle, was at odds with the 'official policy' of Oklahoma City." (P.Br. 20; see also *id.* at 19, 21). But at trial, counsel for petitioner contended that Rotramel's action was absolutely proper. The Answer filed by petitioner asserted the following "affirmative defenses":

> That the Defendant employee at all times herein mentioned acted in good faith without malice and within the scope of his duties as a police officer of the City of Oklahoma City and peace officer of the State of Oklahoma.
>
> • • •
>
> That the actions of the Defendant and its employee were lawful and proper and probable cause existed for the arrest of Tuttle.
>
> That the action of the Defendant and its employee in all respect [sic] was reasonable, proper and legal. (J.A. 22-23).

The defense offered by the city at trial was not that Rotramel had erroneously shot Tuttle in violation of city policy, but that Rotramel's action was proper in every respect. After eliciting testimony intended to show that Rotramel had killed Tuttle because he feared that Tuttle was about to shoot him, counsel for the city argued:

> There's no problem with the policy, I don't believe . . . [Rotramel] shot that man because he thought his life was in danger. He did not wait to see an offensive weapon. . . . He thought William Adam Tuttle was the armed robber. He was in a position to grab a weapon. He was in a position to turn around and shoot him, and I submit to you, he shouldn't have to wait to see that

> weapon under those circumstances. . . . I contend that officer Rotramel acted in a reasonable and good faith belief, while he was acting as a police officer, and as he should have reacted, to protect his life. . . . He was acting as should have acted, acting as he reasonably believed he was in danger of his life. He was a properly trained police officer. . . . I hope that you'll bring back a verdict for both defendants, Julian Rotramel, for acting properly, and for the City of Oklahoma City for training him so. (Tr. 672-79).

In this Court the city denounces Rotramel's conduct as "excessive" and unauthorized, but in the district court the city urged the jury to conclude that Rotramel's action was entirely consistent with city policies and training.

The defense adduced at trial hinged, not on any criticism of Rotramel's action, but on a disagreement about what had occurred on the night of October 4, 1980. The city offered testimony which, if believed, might have led a jury to conclude that Rotramel had substantial reason to think that Tuttle had a gun and was preparing to use it. Rotramel testified that the barkeeper did not tell him there was no armed robbery in progress,[3] that while in the bar Tuttle had twice attempted to reach for his boot,[4] that Rotramel had physically restrained Tuttle[5] until Tuttle broke loose and ran out of the bar,[6] that Rotramel had repeatedly shouted at Tuttle to halt,[7] and that outside the

[3] J.A. 169, 179, 210.

[4] J.A. 171, 179, 207, 209.

[5] J.A. 168, 169, 178, 203, 205.

[6] J.A. 179.

[7] J.A. 158, 170, 172, 180, 183, 222.

bar Tuttle had jumped up and started to turn around before Rotramel shot him.[8] Witnesses who were in the bar, on the other hand, gave a completely different story, asserting that Rotramel was expressly assured in the bar that there was no robbery in progress[9] that Tuttle had never reached in his boot,[10] that Rotramel had not tried to restrain Tuttle physically,[11] that Tuttle had merely walked out the door,[12] and that Rotramel had never shouted halt.[13] Medical evidence offered by plaintiff indicated that outside the bar Tuttle had stumbled rather than crouched to reach for his boot,[14] and that Tuttle was still bent over when he was shot in the back.[15] The testimony offered by plaintiff's witnesses, if credited by the jury, could have compelled the conclusion that Rotramel had killed Tuttle without any reasonable justification.

There was also conflicting evidence on several other issues. First, the various police officials who testified gave different answers regarding whether under city policy a police officer were authorized to shoot a possibly dangerous suspect if the officer had not actually seen a gun or other

[8] J.A. 158, 183, 224.

[9] J.A. 82, 83, 90, 106. Rotramel himself told one investigating officer that he had received that assurance. Tr. 204, 211.

[10] J.A. 84, 100, 107.

[11] J.A. 83-84, 97.

[12] J.A. 109, 132.

[13] J.A. 86, 100, 110, 132; Tr. 601.

[14] Tr. 181.

[15] Tr. 177, 178, 179, 300.

weapon in the suspect's possession.[16] Second, witnesses called by petitioner and respondent disagreed about the adequacy of the city's training policies and about whether any defects in those policies had caused the killing of Tuttle.[17] Third, the testimony raised questions about whether Rotramel was adequately supervised particularly concerning whether Rotramel was too inexperienced to have been permitted to be on patrol by himself.[18]

The district judge instructed the jury, in a manner entirely consistent with *Monell*, that the city could only be held liable if respondent proved both the existence of a city policy, and that that policy had caused the alleged constitutional violation.[19] Petitioner did not object to those instructions at trial, and does not complain of them here. Throughout the proceedings in the district court, however, the city consistently but unsuccessfully insisted that to establish municipal liability under *Monell* respondent was required to establish, not merely that the alleged policies had resulted in the unconstitutional killing of Tuttle, but also that those policies had brought about other similarly unconstitutional police killings or assaults.

The jury returned a verdict holding the city liable for $1,500,000 in actual damages, but imposing no liability on officer Rotramel. The city attorney attacked these verdicts

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[16]The conflicting testimony regarding whether city policy authorized the shooting in question is discussed at pp. 29-32, *infra*.

[17]The conflicting testimony regarding the city's training policies is discussed at pp. 31-32, *infra*.

[18]See pp. 36-37, *infra*.

[19]See pp. 21-22, *infra*.

as inconsistent, apparently insisting that the jury either also hold Rotramel liable or to exonerate both his clients. (Tr. 696, 702). The district judge concluded that the verdicts were consistent:

> "[W]here a municipality pursues as a matter of policy activities that do not comport to the constitution . . ., its liability is absolute even though officials who implement such policies are protected by qualified immunity." . . . I think the good faith defense on behalf of an individual which is not available to the city or municipality is the linchpin of the fact that this is not inconsistent.
>
> • • •
>
> Now, I thought that that was perhaps the hardest part of the plaintiffs case to prove that the failure to train or inadequacy of the training was willful and wantonly negligent. . . . I submitted it to the jury . . . and the jury apparently felt that that was where they thought the illness lay rather than upon officer Rotramel, who I assume . . . they felt that although he did violate the decedent's constitutional rights, that it was in the good faith belief that he had the right to do so under the circumstances here.

(Tr. 703-06). The city moved orally and in writing for judgment notwithstanding the verdict. The district court denied both motions, concluding "the plaintiff brought forward sufficient evidence regarding inadequate training and procedures to warrant submission to the jury of the issue of municipal liability . . ." (J.A. 58).[20]

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[20]See also Tr. 702 (respondent adduced, not only proof of the constitutional violation at issue, but "additional evidence of . . . lack of training or failure to train, or failure to supervise . . ."), 704 ("there was considerably more evidence presented here than the fact that the . . . shot

(3) Proceedings in the Court of Appeals

Both petitioner and respondent appealed from the verdict and the decision of the district court. Respondent contended that the judgment in favor of officer Rotramel was improper, and that the trial judge should have directed a verdict against Rotramel on the issue of liability. The city challenged on a number of grounds the verdict against it. The tenth circuit rejected both appeals.

In upholding the verdict in favor of Rotramel, the court of appeals emphasized the role of the jury in resolving the conflicting testimony. (J.A. 65). The court of appeals recognized that Rotramel's good faith defense "does not seem to be strongly supported," but concluded that the issue was properly submitted to the jury for decision. (J.A. 66). "Inasmuch as the jury was properly instructed and since there is evidence which favors Rotramel, we cannot assume that the [jury's] conclusion was improper." (J.A. 66). If the jury construed the evidence "in the light most favorable to the defendant . . . it could find that he reasonably believed his response was permitted." (J.A. 65-66).[21]

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[20](Continued)

someone in deprivation of their civil rights. There was a good deal of evidence. . . ."), 704-05 ("I was impressed with the evidence that was presented in this case that the curriculum methods and the lack of supervision and training was more than . . . just negligence"), 706 ("you put in enough evidence in my opinion that reasonable minds could differ with regard to that.").

[21]The court of appeals' opinion asserts that "Rotramel admitted at trial that he violated Police Department policy in shooting Mr. Tuttle." (J.A. 65). That is not correct. Rotramel insisted that his action was entirely consistent with city policy. See pp. 29-30, *infra*.

Petitioner argued in the tenth circuit that the trial judge had instructed the jury that it could find the city liable for a policy that was merely negligent, and insisted that respondent should have been required to prove gross negligence. The court of appeals rejected this objection on the ground that the jury had in fact been instructed that the city could not be held liable unless there was "gross negligence and deliberate indifference to the rights of the decedent." (J.A. 69). Somewhat inexplicably, the tenth circuit's opinion contains no reference to this Court's opinion in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), which expressly rejected the contention that liability could not be imposed in a section 1983 action without a showing of intentional or grossly negligent conduct.

Petitioner also contended that respondent had failed to adduce sufficient evidence to warrant submitting to the jury any claim against the city. The court of appeals, however, observed that, in addition to the particular circumstances surrounding the killing of Tuttle,

> there was plenty of independent proof of lack of actual training. In this case the individual defendant had been on the police force for a very short period of time; moreover, he admitted his lack of training to cope with robberies. Nevertheless, he was allowed to go in on a suspected robbery by himself. (J.A. 71).[22]

The tenth circuit therefore concluded that there was "adequate evidence" to warrant submission of the claim to the jury. (J.A. 68).

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[22]See also J.A. 68 ("Even the officer admitted the inadequacy of the training").

Third, respondent argued in the court of appeals, as it does here, that municipal liability under *Monell* required proof of a series of constitutional violations, and that a city could not be held liable if there was only a "single incident." The tenth circuit held that the relevance and importance of evidence of any other violations depended in each case on the type of municipal policy which a plaintiff sought to prove, and on the nature of the other evidence which the plaintiff adduced to support his or her claim. In this case the court of appeals concluded that respondent had produced sufficient evidence, over and above the killing of Tuttle, to warrant submission of her claim to the jury. (J.A. 70-71).

The court of appeals also upheld the amount of damages awarded by the jury. Judge Barrett concurred on the ground that "the trial court properly and adequately instructed the jury." (J.A. 72).

SUMMARY OF ARGUMENT

I. The district court in this case expressly instructed the jury that it could not impose liability on the city based on *respondeat superior*, and that municipal liability would have to be based on a finding (a) that there was a relevant city official policy or action, and (b) that that official policy or action had caused the death of respondent's husband William Tuttle. The jury was also instructed that the issue of whether or not Tuttle's death was caused by a city policy was "a question of fact." (J.A. 43). Each of these instructions was consistent with *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978), and none were objected to by petitioner.

The jury verdict in this case must be sustained on appeal even though the evidence might justify a finding either way. The Seventh Amendment limits appellate review of jury verdicts even more severely than the Rule 52 restriction on appellate review of trial court findings. See *Pullman Standard Co.* v. *Swint*, 456 U.S. 273 (1982). Appellate reconsideration of a jury verdict is particularly inappropriate when, as here, issues of credibility are involved. *Compare Anderson* v. *City of Bessemer City*, No. 83-1623. In reviewing a jury verdict this Court must "view the evidence in the light most favorable to [the prevailing party] and . . . give it the benefit of all inferences which the evidence supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co.* v. *Union Carbide Co.*, 370 U.S. 690, 696 (1962).

In this case there was conflicting evidence regarding whether (a) the shooting of Tuttle was authorized by city policy, (b) the shooting was caused by inadequate city training policies, and (c) the shooting was caused by inadequate city supervision policies. The resolution of this conflicting evidence was a matter for the jury.

II. The question presented framed by petitioner is whether the mere existence of a single act of police brutality compels as a matter of law a finding of municipal liability. This case presents no such question.

This case is not a case in which the plaintiff proved only that an innocent civilian had been killed. Respondent offered direct evidence that the shooting was caused by municipal policies. The officer who shot Tuttle testified that city training policies were inadequate and had led to Tut-

tle's death. The offical who was Chief of Police when Tuttle was shot insisted that the shooting was entirely consistent with city policy.

The implausible doctrine to which petitioner objects—that a single constitutional violation invariably compels a finding of municipal liability—has never been advanced by respondent, was not adopted by either court below, and is not presented by this case.

III. Petitioner appears to argue that a plaintiff under *Monell* must prove *both* the existence of a policy or custom that caused the injury complained of *and* the existence of "a regular pattern of constitutional deprivations." Nothing in *Monell* sanctions this second requirement. *Monell* itself provided that an official "decision" would suffice to establish liability, although a single decision will often have only a single victim. There was only one constitutional violation and deprivation in *Owen* v. *City of Independence*, 455 U.S. 622 (1980).

Proof of a "regular pattern of constitutional deprivations" is not the only type of evidence on which a plaintiff can rely to prove an official policy or decision. Such proof clearly cannot be required where a plaintiff asserts the existence of a policy or decision which by its own terms will have only one victim. Even as to policies which might cause several constitutional violations, direct evidence of the substance of those policies, such as was introduced here, is at least as probative as a statistical pattern of injuries suggesting the existence of a common cause

ARGUMENT

I. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S FINDING OF MUNICIPAL LIABILITY UNDER *MONELL v. NEW YORK CTY DEPT. OF SOCIAL SERVICES*, 436 U.S. 658 (1978).

(1) The Decision in *Monell*

The issue raised by the petitioner in this Court poses a narrow question regarding the circumstances under which damages may be awarded against a city under *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978). Petitioner has not sought, and this case does not require, any comprehensive exegesis of *Monell*, but the basic holding of that decision provides the context in which the present case arises.

Prior to *Monell* this Court had held in a series of decisions dating from *Monroe* v. *Pape*, 365 U.S. 167 (1961), that a local government was not a "person" subject to suit under 42 U.S.C. § 1983.[23] *Monell* overruled *Monroe*, and held that that earlier decision had misread the legislative history of the 1871 Civil Rights Act, from which section 1983 is derived. *Monell* also concluded, however, that a local government could not be held liable under section 1983 merely because a government employee had engaged in unconstitutional conduct. To establish a claim under *Monell* a plaintiff is required to establish two distinct elements, first, that there was a relevant official action or custom, and, second, that that action or custom had caused the constitutional violation complained of. 436 U.S. at 692-95.

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[23] *But see Monell* v. *New York City Dept. of Social Services*, 436 U.S. at 663 and nn.5 and 6.

Monell recognized that in establishing the existence of an official action a plaintiff might rely either on the identity of the official who took that action or on the substance the action itself. Thus *Monell* referred both to action "by those whose edicts or acts may fairly be said to represent official policy," 436 U.S. at 694, and to "a policy statement, ordinance, regulation, or decision officially adopted and promulgated. . . ." 436 U.S. at 690. In any governmental unit there will be some individuals with such broad authority that all of their "edicts or acts may fairly be said to represent official policy." [24] But liability under *Monell* is not limited to the conduct of high ranking officials; it extends to any action or policy that has received "approval through the body's official decision making channels." 436 U.S. 691. Frequently the official decisionmaking process in a city or county will be delegated to a number of subordinate employees. The policy at issue in *Monell*, for example, had been adopted by a minor personnel official of the Department of Social Services, exercising authority delegated to him by his supervisors.[25]

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[24] A number of lower court decisions under *Monell* have focused on the high position of the government employee responsible for the constitutional violation. *Hearn* v. *City of Gainesville*, 688 F.2d 1328 (11th Cir. 1982) (city manager and personnel director); *Black* v. *Stephens*, 662 F.2d 181 (3rd Cir. 1982) (police chief); *Kingsville Independent School District* v. *Cooper*, 611 F.2d 1109 (5th Cir. 1980) (trustees of school board). Several decisions correctly observe that the actions of officials who exercise the "final authority" over some area of responsibility are necessarily official action under *Monell*. *Schneider* v. *City of Atlanta*, 628 F.2d 915, 920 (5th Cir. 1980); *Familias Unidas* v. *Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980).

[25] *Monell* v. *New York City Dept. of Social Services*, stipuation dated May 16, 1974, p. 2. The lower courts have consistently recognized that

Monell does not require proof of an ordinance, regulation or policy of general application which injures a number of different individuals; a single "decision", possibly harming only one person, is sufficient. In *Owen* v. *City of Independence*, 455 U.S. 622 (1980) the city "policy" which gave rise to liability under *Monell* was the dismissal of a single city employee.

Monell also held that a city or county could be held liable on the basis of an official custom. This holding has its roots in the language of section 1983, itself, which provides a cause of action for certain conduct ". . . under color of any law, statute, ordinance, regulation, custom, or usage of any State. . . ." This Court noted that in framing section 1983 Congress had "included such customs and usage because of persistent and widespread discriminatory practices by state officials." 436 U.S. at 691. *Monell* emphasized that the actual practices of government officials were often a better indication of official policy than ordinances or regulations which might ignore or even forbid those very practices:

> It would be a narrow conception of jurisprudence to confirm the notion of "laws" to what it found written on the statute books . . . settled state practice . . . can establish what is state law. . . . Deeply embedded tra-

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[25] (Continued)

a plaintiff may meet his burden under *Monell* by offering proof of action taken by officials exercising delegated authority or discretion. *Hearn* v. *City of Gainesville*, 688 F.2d 1328, 1334 (11th Cir. 1982); *Kingsville Independent School District* v. *Cooper*, 611 F.2d 1109, 1112 5th Cir. 1980); *Peters* v. *Township of Hopewell*, 534 F.Supp. 1324 (D.N.J. 1982); *Katris* v. *City of Waukegan*, 498 F.Supp. 48, 51 (N.D. Ill. 1980).

> ditional ways of carrying out state policy . . are often tougher and truer law than the dead words of the written text.

436 U.S. at 691 n.56. The lower courts have generally held that a custom within the meaning of *Monell* is established where a plaintiff shows that a particular practice occurred with such frequency or notoriety that responsible supervisory officials would or should have known of its existence.[26]

In addition to proving the existence of an official action, policy or custom, a plaintiff must also demonstrate that that action, policy or custom in fact " 'cause[d]' an employee to violate another's constitutional right." 436 U.S. at 692.[27] Section 1983 imposes liability on any person who "shall subject, or cause to be subjected, any person" to a deprivation of a constitutional right. Thus an action, policy or custom might cause a constitutional violation in either of two ways. First, a city policy might itself be unconstitutional, such as a rule that police are to shoot at a fleeing suspect if he or she is black. Second, a city policy, although not unconstitutional on its face, might cause municipal employees to engage in unconstitutional conduct, such as a practice of teaching police rookies how to shoot to kill, but not instructing them when they should and should not shoot at all.

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[26] *Bennett* v. *City of Slidell*, 728 F.2d 762 (5th Cir. 1984) noted, "where the violations are flagrant or severe, the fact finder will likely require a shorter pattern of conduct to be satisfied that diligent governing body members would necessarily have learned of the objectionable practice and acceded to its continuation."

[27] *See also id.* at 691 (government liable only if official action or custom "of some nature caused a constitutional tort.").

In *Parratt* v. *Taylor*, 451 U.S. 527 (1981), this Court held that in a section 1983 action against an individual, liability could be imposed so long as it was foreseeable that the defendant's actions would cause a constitutional violation.[28] Nothing in *Parratt*, *Monell* or the language of section 1983 suggests that the negligence standard announced in *Parratt* is any less applicable when the "person" named as the defendant is a government body rather than a government employee or some other individual. The legislative history of section 1983 relied on in *Monell* itself clearly indicates that Congress believed liability appropriate where a government defendant with the ability to prevent an injury "neglect[ed] or refuse[d] so to do." 436 U.S. at 692 n.57, quoting 42 U.S.C. § 1986.

The elements which *Monell* establishes as essential to a claim against a municipality—causation and custom or official action—are all essentially factual in nature. The issue of causation under *Monell* is indistinguishable from the issues of causation which frequently arise in ordinary tort actions, and are generally regarded as issues of fact to be resolved by a jury. A question of "proximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case." W. Prosser & W. P. Keeton, *The Law of Torts* p. 321 (5th ed. 1984).

In *Monell* actions the parties are typically in disagreement as to whether the action of a particular employee

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[28] *Monroe* v. *Pape* had earlier noted that Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. at 187.

which occasioned the injury at issue was caused by the poor judgment or malice on the part of that employee, or by the directions and training, or lack thereof, which the employee received from the city. Such disputes are similar to questions of motivation, the factual nature of which this Court emphasized in *Pullman-Standard Co.* v. *Swint*, 456 U.S. 273, 288-89 (1982). When, as will ordinarily be the case, reasonable observors could disagree about why a city employee engaged in unconstitutional conduct, the matter must be left to the jury. If in such a case the jury concludes that the constitutional violation was caused by a city action, policy or custom, "[i]t does not matter that, from the evidence, the jury may also with reason . . . attribute the result to other causes." *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U.S. 108, 117 (1963).

A claim that a constitutional tort was caused by an official custom would raise similarly factual issues. Although *Monell* holds that a custom can be demonstrated by proof of "persistent and widespread . . . practices," 436 U.S. at 691, *Monell* does not fix any particular number of discrete incidents as necessary or sufficient to meet that standard. Similarly, althought the lower courts generally, and in our view correctly, have held that incidents of particular gravity or notoriety are especially probative of the existence of a custom, no mechanical test has been suggested or can readily be imagined for factoring in the significance or triviality of the events alleged to demonstrate a custom. The weighing of such evidence must ordinarily be left to a jury instructed to decide whether that evidence is sufficient to establish a custom for which the government involved may fairly be held accountable.

Disputes about the existence of an official action or policy are similarly factual in nature. In this particular case the district judge expressly instructed the jury that "[t]he existence of . . . a policy is a question of fact for you to determine" (J.A. 43); respondent did not object to that instruction at trial and does not complain of it here. The factual disputes that arise in *Monell* actions about the existence of an official action are typically one or both of two varieties: first, whether a particular action was taken or policy was promulgated by a given official; second, whether the official responsible for that action or policy was exercising delegated authority. In government agencies where actual practice may often seem to differ from policies suggested by written rules or trial testimony, the record will ordinarily present conflicting evidence which only a jury can resolve. Similarly, in local government bodies where the delegation of authority is generally informal and unwritten, the evidence adduced at trial will often support different conclusions.

The specific instructions of the district judge in the instant case closely tracked the language of *Monell*. The judge expressly admonished that it could not hold the city liable merely because officer Rotramel was a municipal employee:

> If a police officer denies a person his constitutional rights, the city that employs that officer is not liable for such a denial of that right simply because of the employment relationship. Thus, in this particular case, you are instructed that the City of Oklahoma City is not liable for the deprivation of the decedent's constitutional rights solely because it hired and employed the Defendant Rotramel. But there are circumstances

> under which a city is liable for a deprivation of a constitutional right. Where the official policy of the city causes an employee of the city to deprive a person of such rights in the execution of that policy, the city may be held liable. (J.A. 42).[29]

The trial judge noted that the parties were in disagreement as to whether there was "an official policy of the City of Oklahoma City which results in constitutional deprivations" (J.A. 43); the jury was instructed, with regard to the conflicting claims and evidence:

> The existence of such a policy is a question of fact for you to determine. The policy, if it existed, need not be expressed in writing; it may be an implicit policy. An official policy can be inferred from the acts of a municipality's supervisory officials, as well as from its omissions. . . .
> (J.A. 43-44).

. The district judge also made clear that respondent was required to establish a causal connection between any official action, policy or custom and the injury complained of. (J.A. 42-43). The judge explained:

> Anyone who "causes" any citizen to be subjected to a constitutional deprivation is . . . liable. The required causal connection can be established not only by some kind of direct personal participation in the deprivation but also by setting in motion a series of acts by others which the actors know or reasonably should know would result in the constitutional injury being inflicted upon others. (J.A. 45-46).

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[29]This instruction is essentially the same as the standard urged by petitioner in this Court. See P. Br. ii, 8, 9.

The petitioner did not object at trial to any of these instructions, and does not contend in this Court that any of them were incorrect. The instructions set out above are entirely faithful to the decision in *Monell*, and properly called upon the jury to resolve the conflicting contentions and testimony regarding both causation and the existence of official action or policy.

(2) The Standard of Review

Petitioner expressly contended in the court of appeals that district judge erred in denying its motions for a directed verdict and for judgment notwithstanding the verdict, contending, as it did at trial, that the evidence was insufficient to justify submission of the case to the jury. (J.A. 66). Petitioner did not, however, seek review by this Court of this aspect of the tenth circuit's opinion, but limited its petition to the so-called "single incident" question discussed *infra*. In its principal brief in this Court petitioner does not refer to its unsuccessful motions in the district court, does not assert that the case was improperly submitted to the jury, and does not suggest that any dispute about the sufficiency of the evidence could be characterized as encompassed within the actual question presented. A brief review of the conflicting evidence adduced at trial is nonetheless necessary to understand the context in which the "single incident" question arises in this case.

In assessing the sufficiency of the evidence on which a jury based its verdict, neither a trial judge nor the appellate courts are free "to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel

that other conclusions are more reasonable." *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35 (1944).[30] A case must be submitted to the jury "if evidence might justify a finding either way," *Wilkerson* v. *McCarthy*, 336 U.S. 53, 55 (1949), and "fair-minded men might reach different conclusions", *Bailey* v. *Central Vermont R. Co.*, 319 U.S. 350, 353 (1943). A direct verdict is inappropriate except in the extreme case in which there is only one reasonable conclusion that a jury could possibly draw. In assessing a request for such a directed verdict or judgment n.o.v., the courts are required "to view the evidence in the light most favorable to [the opposing party] and to give it the benefit of all inferences which the evidence supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co.* v. *Union Carbide Co.*, 370 U.S. 690, 696 (1962).[31]

"[W]here, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury." *Ellis* v. *Union Pacific R. Co.*, 329 U.S. 649, 653 (1947). In the instant case counsel for petitioner repeatedly and correctly contended in his closing argument that the jury's verdict would necessarily turn on its assess-

[30]See also *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946) (it is "immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.").

[31]*See also Anderson* v. *Smith*, 226 U.S. 439, 440 (1913) (court considering motion by defendant must adopt "the view most favorable to the plaintiff of the evidence"); *Kane* v. *Northern Cent. R. Co.*, 128 U.S. 91, 94 (1888) (opposing party to be given "the benefit of every inference to be fairly drawn from" the evidence); *cf. Pawling* v. *United States*, 8 U.S. (4 Cranch.) 219, 222 (1808) ("the testimony is to be taken most strongly against" the moving party).

ment of the credibility of the witnesses.[32] This Court has repeatedly emphasized that issues of credibility are solely within the province of the jury.[33] *Cf. Anderson* v. *City of Bessemer City*, No. 83-1623. The resolution of conflicting evidence is equally a matter for the jury alone. "Where uncertainty . . . arises from a conflict in the testimony . . . the question is not one of law but of fact to be settled by the jury." *Gunning* v. *Cooley*, 281 U.S. 90, 94 (1930).[34] "[T]he jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion." *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946).

[32]Tr. 671 ("I want you to recall what you heard off the witness stand, and recall each of those witnesses and their demeanor, and decide whom you believe"), 676 ("You have to see who you believe on the credibility of that witness [Hinds] . . ."), 677 ("You've seen all these witnesses. You have to decide which ones are telling the truth . . ."; "[Y]ou just have to depend on the credibility of officer Rotramel.").

[33]*Ellis* v. *Union Pacific R. Co.*, 329 U.S. 649, 653 (1947). ("[T]he decision as to which witness was telling the truth . . . [is a] question[] for the jury"); *Lavender* v. *Kurn*, 327 U.S. 645, 652 (1946) ("I[I]t would be an undue invasion of the jury's historic function for an appellate court to . . . judge the credibility of witnesses . . ."); *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35 (1944) ("It is the jury, not the court, which . . . judges the credibility of witnesses . . .").

[34]*See also Ellis* v. *Union Pacific R. Co.*, 329 U.S. 649, 643 (1947); *Lavender* v. *Kurn*, 327 U.S. 645, 652 (1946); *Bailey* v. *Central Vermont R. Co.*, 319 U.S. 350, 353 (1943); *Richmond & Danville Railroad Co.* v. *Powers*, 149 U.S. 43, 46 (1893).

The drawing of inferences from both disputed and uncontroverted testimony is also ordinarily a matter for the jury:[35]

> It is the jury, not the court, which . . . draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.

Tennant v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35 (1944). In the instant case the trial judge instructed the jury, correctly and without objection, that it could "make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established. . . ." (J.A. 31). The drawing of such inferences "in the light of common experience" (J.A. 31) is consigned to the jury because of the very wealth and diversity of experiences which the members of the jury bring to their deliberations.[36]

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[35] *Ellis* v. *Union Pacific R. Co.*, 329 U.S. at 653 ("[I]t would be an invasion of the jury's function for an appellate court to draw contrary inferences. . . ."); *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 68 (1943) (where " 'fair-minded men may draw different inferences,' the case should go to the jury.").

[36] "Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the fact proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring, than can a single judge." *Sioux City & Pacific R.R. Co.* v. *Stout*, 84 U.S. 657, 664 (1874).

The application of *Monell* frequently requires, as it did here, that the finder of fact resolve conflicting evidence and draw inferences regarding policies, customs, causation, and the delegation of authority. Several of the cases cited by petitioner reflect an ill-conceived inclination on the part of the lower courts to usurp the role of the jury in such matters. But nothing in *Monell* suggests that the factual issues made critical by that decision are to be resolved by courts. There is "no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as all others." *Jones* v. *East Tennessee, V. & G. R. Co* ,.128 U.S. 443, 446 (1898).

Deference to the preeminent role of the jury is particularly appropriate in actions such as this seeking redress for unconstitutional conduct by government officials. Although the Seventh Amendment's right to trial by jury extends to the most mundane commercial and tort litigation, the primary concern which led to the adoption of that guarantee was a desire to assure that in civil as well as criminal cases juries would protect and enforce the substantive rights guaranteed by the Constitution. The men who framed the Seventh Amendment were well aware of the critical role which civil juries had played in establishing the right against unreasonable searches and seizures.[37] Thomas Jefferson insisted that jury trials were "the only anchor yet imagined by man, by which a government can

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[37] For a discussion of the infamous Wilkes case, and the resulting litigation, see, e.g., G. Rude, *Wilkes and Liberty*, 17-37 (1962).

be held to the principles of its constitution."[38] The Virginia convention resolved that "in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and [ought] to remain sacred and inviolable."[39] The first draft of the Seventh Amendment also characterized trial by jury in civil cases as "one of the best securities to the rights of the people."[40] This Court emphasized in *Hodges* v. *Easton*, 106 U.S. 408, 413 (1882), that the right of trial by jury in civil cases was intended as "a fundamental guaranty of the rights and liberties of the people."

In *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), Justice Rehnquist observed that the Seventh Amendment was adopted in part because its framers believed that juries would often be more vigilent than judges in enforcing fundamental liberties:

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwork against tyranny . . . a safeguard too precious to be left to the whim of . . . the judiciary. . . . [T]he concerns for the institution of jury trial that led to the passages of the Declaration of Independence and to the Seventh Amendment were not animated by a belief that use of juries would lead to more efficient judicial administration. Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense . . . and thus keep the administration of law in accord with the wishes and feelings of the community. . . Those

[38] 3 *The Writings of Thomas Jefferson* 71 (Washington ed. 1861).

[39] 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 658 (1856).

[40] 1 Annals of Cong. 435 (1789).

> who favored juries believed that a jury would reach a result that a judge either could not or would not reach.

439 U.S. at 343-44 (dissenting opinion). Where, as here, the vindication of fundamental rights and liberties is at issue, federal judges should be particularly reluctant to interfere with the institution which the Seventh Amendment contemplates will prevent or provide redress for violations of the Constitution.

(3) The Evidence in This Case

The evidence adduced at trial was sufficient to warrant submitting the issue of municipal liability to the jury on each of three distinct theories. First, there was substantial evidence from which the jury could have inferred that the shooting of Tuttle under the circumstances of this case was authorized by city policy. Second, there was sharply conflicting evidence with regard to whether the shooting at issue had been caused by a city policy of inadequately training police officers. Third, there was similarly conflicting evidence regarding whether the city policy regarding the supervision of rookie officers had led to Tuttle's death.

(1) The defense theory in the district court, as we noted earlier, was that Rotramel's conduct was in every respect "reasonable, proper and legal." (J.A. 23). See pp. 7-10, *supra*. At trial officer Rotramel insisted that his shooting of Tuttle was entirely consistent with departmental rules requiring the "utmost discretion" in the use of his gun:

> Q. And you knew that you were to exercise the utmost discretion in the use of your weapon?

A. Yes, sir.

Q. And you really didn't exercise the utmost discretion in the use of your weapon, did you, sir?

A. Yes, I did.

* * *

Q. If you had to do it over, would you do it again?

A. Yes, sir I would have to.

Q. Without any hesitation?

A. Yes, sir.

Q. That's the way they trained you, isn't it?

A. I believe so.

(Tr. 587-88; J.A. 227). Former Police Chief Hagey,[41] who was the chief of police when Tuttle was killed, testified that Rotramel was authorized to use his gun if he believed, however mistakenly, that Tuttle was armed and dangerous:

Q. Would you shoot him?

A. I don't know.

Q. Would you be justified in shooting him?

A. If I thought my life was in danger, yes, sir.

Q. At that point and time and that hypothetical, would you be justified in shooting him?

A. Well, see, you're asking for somebody's answer, but I wasn't there. I don't know. I don't know what the officer felt at that time.

[41]The former chief's name is in fact spelled "Heggy"; for purposes of consistency with the Record, however, we use the incorrect spelling "Hagey" which occurs throughout the transcript.

(Tr. 418-19).[42] Other officers give conflicting testimony regarding whether they understood Rotramel was authorized to kill Tuttle under the circumstances of this case.[43]

There were similar conflicts regarding other possibly critical aspects of departmental policy. Captain Adams testified that officers were permitted to shoot without actually waiting to see if a suspect had a gun (Tr. 339); officer Routon insisted that officers were instructed not to shoot until they saw a gun. (Tr. 431). Chief Hagey stated it was city policy that where possible officers were to shoot to wound and thus "stop a person from doing what he intends to do" (Tr. 394); but another officer insisted police were only taught to shoot to kill, and Rotramel testified he never considered shooting to wound. (J.A. 162, 225). Officer Routon stated that officers were instructed never to shoot "if there is the slightest doubt" (Tr. 432); but Chief Hagey swore that officers were authorized to shoot even if there is "a certain amount of doubt." (Tr. 353).

In this Court petitioner, disregarding all of this testimony, relies exclusively on the section 9.03 of the police manual, which provides "a police officer is justified in using his firearm only in defense of life and instances where the suspect is armed and/or making an attempt to kill or do

[42]See also *id.* at 424:

"Q. Okay. Are you just telling this jury that if that officer thought he was going for a gun, he was entitled to shoot him and kill him dead?

A. I'm saying if the officer thought he was going for a gun, the officer had a right to stop him, yes."

[43]Tr. 144-46 (no), 160 (yes), 170 (no), 475 (probably not); J.A. 245-48 (no), 262-64 (probably not).

great bodily harm." (P.Br. 6, 19). Petitioner suggests that this section means that only a suspect who is *in fact* armed and dangerous may be shot, and that an officer would violate that policy if he used his weapon in a mistaken belief that his life was in danger. But neither Chief Hagey nor any other officer who testified understood or interpreted the written rules to impose such strict liability. Chief Hagey explained that Section 9.03 authorized police officers to kill "in defense obviously of their life or when they *believe* their life is threatened . . ." (Tr. 373) (emphasis added).[44] All the witnesses apparently agreed that city policy authorized the use of a firearm based on a mere belief that a suspect was armed and dangerous.

Petitioner's argument clearly illustrates the danger in construing city policy solely by reference to the cold letter of city manuals and memoranda, rather than by relying on actual practice and the understanding of city officials. *Monell* itself cautioned that actual practice was a "truer law than the dead words of the written text." 436 U.S. at 691 n.56. In *Monroe* v. *Pape* this Court noted that the Congress which framed Section 1983 was primarily concerned with abuses that had occurred under color of law but were not contained in "the state law on the books." 365 U.S. at 176; see also *id.* at 174-183. If the mere adoption of an empty rule forbidding an unconstitutional practice could conclusively establish the existence of a municipal policy, both *Monell* and *Monroe* would be a dead letter. See "Civil Rights Litigation after *Monell*," 79 *Col. L. Rev.* 213, 231-34

[44] *See also id.* 413 ("the officer has to have knowledge or believe that his life is threatened at that time.").

(1979). In this case the jury, although concluding that Rotramel had no reasonable basis for fearing that Tuttle would shoot him, was certainly entitled to credit the testimony of Chief Hagey and other witnesses that Rotramel's action was nonetheless authorized by city policy.

(2) A considerable portion of the trial was concerned with whether the killing of Tuttle was the result of inadequate training policies. As petitioner notes, Rotramel received the same training as all other cadets. (P.Br. 21). Petitioner acknowledged that the training program represented official policy, but insisted that the training was entirely adequate and had not caused the shooting at issue.

Much of the testimony supporting respondent's attack on petitioner's training policy was elicited from officer Rotramel himself in a deposition that was subsequently admitted into evidence . Rotramel repeatedly acknowledged that his training appeared to be inadequate.[45] Rotramel identified half a dozen areas in which he had never received

[45] J.A. 153:

"Q. Can you tell me under oath that you were adequately trained to handle that specific situation?

A. No."

J.A. 159:

"Q. Perhaps they didn't quite train you well enough in that situation, did they?

A. Perhaps."

J.A. 162-63:

"Q. So perhaps you weren't as well trained by your employer as you should have been in that specific situation, is that a fair statement?

A. Yes."

any training, including whether to wait for a backup unit,[46] how to handle an armed robbery call as a single officer,[47] how to enter a building in which an armed robbery might be taking place,[48] especially if the building had no windows,[49] how to apprehend a fleeing suspect,[50] and how to shoot a suspect so as to disable but not to kill him.[51] Rotramel conceded that, had he been given this training, Tuttle might well not have been killed.[52]

Respondent also relied on the testimony of an expert on police training and procedure, Dr. George Kirkham. Dr. Kirkham had experience in the training of officers in some 50 different law enforcement departments across the country, including the F.B.I., and was the author of a num-

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[46]J.A. 147, 152, 153.

[47]J.A. 146.

[48]J.A. 146.

[49]J.A. 146, 152.

[50]J.A. 159, 164-65.

[51]J.A. 162.

[52]J.A. 163:

"Q. And if you would have been adequately trained that specific situation, Mr. Tuttle would be alive. . . .?

A. That's possible."

J.A. 165:

"Q. Do you think it would have been more probable that he would not have been shot if you would have had that adequate training?

A. It's possible.

Q. So your answer is yes.

A. Yes."

ber of the training manuals actually used by Oklahoma City Police Department. (J.A. 271-282). Kirkham characterized the city training program as "slipshod" (J.A. 288), and identified many of the same deficiencies in the training program that had been recognized by Rotramel himself, including the lack of training regarding waiting for a backup unit,[53] entry into a building in which a robbery was in progress,[54] and apprehension of a fleeing or dangerous suspect.[55] Kirkham emphasized that the Oklahoma City training program focused heavily on how to kill a suspect, with little consideration of how to investigate a crime without resorting to violence. That training program provided some 80 hours of practice on the firing range, but only 24 minutes of instruction concerning how to act at the scene of an armed robbery.[56] Kirkham explained:

> [O]f course its fine for officers to know the . . . mechanics of firearms use, but its also important for them to understand from the practical standpoint, the circumstances in which one uses firearms, . . . and these things apparently were not gotten across.

(J.A. 288). Kirkham concluded, as had Rotramel, that "[i]f he had been properly trained and supervised, the occurrence would not have taken place." (J.A. 301; see also J.A. 286, 288).

The city offered in response to this testimony evidence which, as petitioner's brief makes clear, might, if credited

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[53]J.A. 286, 289, 291, 292, 301, 302.

[54]J.A. 286-91.

[55]J.A. 294, 300-01.

[56]J.A. 287-88, 302-04.

by the jury, have led to the conclusion that the city training policies had not caused the constitutional violation at issue. (P.Br. 6-7). But the direct conflicts in the evidence adduced by the parties, and the differing inferences that might have been drawn from that evidence, were matters for the jury's consideration.

The city urges that the evidence of inadequate training was "irrelevant," asserting that any defective training concerned only the time and manner in which officer Rotramel entered the bar (P.Br. 8). In fact both Rotramel and Kirkham noted that the city had failed to provide adequate training concerning the manner in which Rotramel should have acted after both he and Tuttle left the bar. In addition, as Kirkham noted, Rotramel's ill considered conduct prior to the actual shooting had needlessly placed Rotramel in a potentially dangerous situation and created the very ill founded fears which led to Tuttle's death. The jury, of course, was not obligated to find that the shooting was caused by any aspect of Rotramel's training, but the question of whether that training was in fact the cause of the shooting was an issue for the jury to resolve.

(3) There was a somewhat simpler conflict regarding whether the shooting of Tuttle was caused by the city's supervision policies. Chief Hagey testified that ideally a rookie cop should not be permitted to patrol alone in a squad car until he or she had at least 18 to 24 months experience on patrol with a senior officer. (Tr. 369-372). At one time the city had apparently enforced a rule that no rookie could be placed on solo patrol without at least one year of experience. (Tr. 199). At some undetermined time, however, that rule was relaxed because of a shortage of

manpower. As of 1980 rookie officers were permitted to patrol by themselves as soon as six months after they left the police academy. (Tr. 200). In this Court, as at trial, the city defends this practice as a method of saving money. (Tr. 206, 446; P.Br. 22).

Respondent contended that officer Rotramel should not have been permitted to drive alone in a squad car, not accompanied by a senior officer. In this regard the substance of city policy, which permitted rookies to patrol alone with less than one year of experience, was undisputed. The disagreement among the parties was limited to the question of whether that policy of putting rookies on the street without direct supervision had led to the shooting of Tuttle. Dr. Kirkham testified that Rotramel was too inexperienced to have been in a solo patrol car (J.A. 302), and that the resulting lack of direct supervision was cause of the killing which followed. (J.A. 301). The petitioner defended the six month policy, and offered testimony designed to show that that policy had not been a factor in Tuttle's death. The conflicting evidence regarding the issue of causation was a matter for the jury to resolve.

II. THE "QUESTION PRESENTED" BY PETITIONER IS NOT IN FACT PRESENTED BY THIS CASE.

The question presented framed by petitioner is as follows:

> Whether a single isolated incident of the use of excessive force by a police officer establishes an official policy or custom of a municipality sufficient to render the municipality liable in damages under 42 U.S.C. § 1983. (P.Br. i).

Read literally the issue thus cast is whether a plaintiff who proves no more than that he was the victim of one act of police brutality is entitled as a matter of law to a judgment against the officer's employer.

Petitioner's brief is devoted largely to a discussion of whether the mere existence of a constitutional violation would in every case not only permit but compel such a verdict. Thus at page 7 petitioner describes the issue as "whether a single isolated occurrence of the use of excessive or deadly force *results in* municipal liability under 42 U.S.C. § 1983." (Emphasis added). On page 8 the brief states, "The City of Oklahoma City asserts that the single act of Rotramel in shooting Tuttle . . . does not establish an 'official policy or custom' of Oklahoma City." And at page 14 petitioner relies on several lower court decisions which it characterizes as holding that "a single act or isolated incident is insufficient to establish municipal liability under § 1983."

Were the instant case one in which respondent had proved only that Tuttle was killed by an Oklahoma City police officer, and had failed to offer any direct proof of the

substance of city policies or the circumstances of the shooting, the question presented by petitioner would be of obvious relevance. But respondent offered far more evidence than merely that incident of excessive force; she adduced testimony directly bearing on the nature of city policies regarding training, supervision, and the use of firearms by police, as well as testimony that those policies had caused the killing of her husband. Both the certiorari petition and the brief for petitioner are cast in such a way as to suggest that no such evidence had ever been presented. With regard to the city's training policies, for example, petitioner argues:

> How can it seriously be contended that Oklahoma City had "an official policy or custom" of giving its police officers grossly inadequate training? Where is the proof that would support such a bazaar [sic] contention? Such proof does not exist. (P.Br. 21).

If this is an assertion that no witness ever testified that the city training policies were inadequate, it is simply false.

Petitioner argues persuasively against the notion that the mere occurrence of a single constitutional violation should invariably compel a finding of municipal liability. Such a rule would be inconsistent with both *Monell's* rejection of the doctrine of *respondeat superior*, and with the constitutionally protected prerogatives of civil juries. But the implausible doctrine which petitioner denounces had never been advanced by respondent, was not adopted by either court below, and is not presented by the record in this case.

III. *MONELL* DOES NOT REQUIRE THAT THE MUNICIPAL POLICY OR DECISION WHICH INJURED A PLAINTIFF HAVE ALSO INJURED OTHER INDIVIDUALS.

Petitioner appears to make in the alternative a second argument, that liability cannot be imposed under *Monell* unless a plaintiff proves the existence of a series of constitutional violations caused by the same offending policy or custom. Thus petitioner asserts that "a plaintiff should be required to submit probative evidence of a regular pattern of unconstitutional deprivation of citizen's rights before municipal liability can attach under § 1983." (P.Br. 17; see also *id.* at 22). Assuming, arguendo, that this contention is fairly encompassed within the question presented, it is clearly without merit.

Insofar as petitioner is arguing a plaintiff prove *both* the existence of a policy or custom *and* "a regular pattern of unconstitutional deprivation[s]," that argument is entirely inconsistent with the decision in *Monell*. *Monell* imposes liability for all official action or custom that causes a constitutional violation, and is not limited to actions or customs that happen to injure scores or hundreds of innocent victims. *Monell* expressly provided that an official "decision" would suffice to establish liability, although a single decision will often have only a single victim. 436 U.S. at 690. Section 1983 imposes liability on a defendant which inflicts a deprivation of constitutional rights on "any citizen of the United States or any other person," not on "a series of citizens" or "yet another person." The policy which served as the basis of municipal liability in *Owen* v. *City of Independence* was, to use petitioner's terminology, "a single

isolated" decision with "a single isolated" victim. Had the Oklahoma City council adopted an ordinance directing the summary execution of Mr. Tuttle, it is inconceivable that the city could have avoided liability under *Monell* by arguing that there was only one name on its hit list. Even an ongoing policy may, because of its particular nature, only result in occasional, although foreseeable, constitutional violations.

Even where a municipal policy is likely to injure a large number of victims, nothing in *Monell* requires that redress be denied to the early victims, or that injunctive relief be withheld until the body count or destruction of property has reached catastrophic proportions. If Oklahoma City were to adopt a policy of expelling all Catholics from the public schools, but was enjoined from implementing that policy after the first few expulsions, surely the success of that injunctive action would not preclude the actual victims of that short lived policy from obtaining compensatory relief. The doctrine advanced by petitioner would require an aggrieved plaintiff to base his or her claim in large measure on evidence that a defendant had violated the constitutional rights of a large number of unrelated third parties; ordinarily, however, a plaintiff is not permitted to "rest his claim to relief on the legal rights or interests of third parties," *Warth* v. *Seldin*, 442 U.S. 490, 499 (1975), and cannot vindicate in federal court a "generalized grievance" shared by a large class of citizens. *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208 (1974).

Petitioner's contention is equally indefensible as a rule of evidence. Proof of a pattern of violations clearly cannot

be required where a plaintiff seeks to establish the existence of a decision, policy or custom that by its very nature had only a single victim, or which has as yet caused but a single injury. The existence of a pattern of violations, like the occurrence of a series of accidents with a piece of machinery, may indicate that existence of a common cause, *see Teamsters* v. *United States*, 431 U.S. 324, 349 (1977), but such a pattern is certainly not the only or necessarily the best way to establish the elements of causation or official action. Frequently, as here, a plaintiff will be able to rely on direct evidence of the causation and official action behind his or her injuries, rather than relying on the experiences of third parties. In this case the city might have augmented its defense with proof that such shootings had not occurred, and the plaintiff might have strengthened her case with proof of other shootings, but the absence of such arguably relevant evidence is not conclusive of the claims of either party.

In some cases, of course, a plaintiff will advance a theory of liability which by its own terms is based on a pattern of constitutional violations. The lower court cases relied on by petitioner are generally of this variety. If a plaintiff alleges the existence of a custom, proof of "persistent and widespread practices" is expressly contemplated by *Monell*. 436 U.S. at 691.[57] Where a plaintiff contends that his or her injury was caused by a failure to discipline government employees who earlier engaged in similar un-

[57]*Bennett* v. *City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984) (en banc); *Gilmore* v. *City of Atlanta*, 737 F.2d 894, 902, 904 (11th Cir. 1984); *Webster* v. *City of Houston*, 735 F.2d 838, 840, 842 (5th Cir. 1984).

consttutional conduct, both such prior conduct and a lack of disciplinary action will have to be shown.[58] Similarly, a claim that responsible supervisory officials failed to put a stop to a known pre-existing unconstitutional practice will require evidence of that earlier practice.[59] But in the instant case respondent's claim was not based on any theory which necessarily asserted the existence of any pattern of constitutional violations.[60]

Even in a case such as this, a defendant could urge the jury to discount the evidence adduced by plaintiff because there was no proof of "a regular pattern of unconstitutional deprivation[s]." A jury would be free to draw any reasonable inference it saw fit from the absence of such evidence. The arguments now advanced by petitioner, suggesting that this Court infer from that lack of such evidence that the city was without fault, are arguments that could and should have been made to the jury that heard this case and was responsible for drawing such inferences. Petitioner's trial counsel, however, apparently considered its "single incident" argument to be little more than a legal technicality by which to prevent submission of respondent's

[58]*Berry* v. *McLemore*, 670 F.2d 30, 32 (5th Cir. 1982); *Herrera* v. *Valentine*, 653 F.2d 1220, 1224-25 (8th Cir. 1981); *Turpin* v. *Mailet*, 619 F.2d 196, 202-03 (2d Cir. 1980); see also J.A. 58.

[59]*McClelland* v. *Facteau*, 610 F.2d 693, 697-98 (10th Cir. 1979); *Welington* v. *Daniels*, 717 F.2d 932, 937 (4th Cir. 1983).

[60]The decision in *Languirand* v. *Hayden*, 717 F.2d 220 (5th Cir. 1983), does appear to limit liability under *Monell* to policies and decisions that cause multiple violations. For the reasons set forth above, we urge that *Languirand* was wrongly decided.

claims to the jury; petitioner's counsel, either regarding the inferential force of this argument as unpersuasive, or recognizing that the existence of other evidence made the issue irrelevant, never bothered to urge the jury itself to draw any adverse inferences from the fact that respondent had proved only a "single isolated incident."

In any *Monell* action the nature and circumstances of the particular constitutional violation at issue will, as even petitioner appears to acknowledge, be relevant evidence with regard to the issues of causation, custom, or official action. The weight of such evidence will ordinarily be a matter of dispute. The trial judge properly referred to the jury the task of assessing the inferences from that and the rest of the evidence. At petitioner's urging the district court cautioned the jury not to give undue weight to the shooting of Tuttle in determining the existence of a city policy.[61] Although that cautionary instruction apparently fell short of what petitioner might have wished, petitioner failed to "state distinctly the matter to which [it] ob-

[61]The full instruction, the first portion of which is omitted in petitioners brief, was as follows:

> "Absent more evidence of supervisory indifference, such as acquiescence in a prior matter of conduct, official policy such as to impose liability on the City of Oklahoma City under the federal Civil Rights Act cannot ordinarily be inferred from a single incident of illegality such as a first excessive use of force to stop a suspect; but a single, unusually excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge."

J.A. 44.

ject[ed] and the ground of [its] objection" as required by rule 51, Federal Rules of Civil Procedure.[62]

The instructions in this case, considered as a whole, were clearly correct. *See Castle* v. *Bullard*, 65 U.S. 172 (1859). The trial judge properly left to the jury the responsibility for deciding what inferences, if any, were to be drawn from the circumstances of the Tuttle shooting with regard to the cause of that tragic incident. Section 1983 was enacted against a background of tort law which clearly permitted a jury to draw such inferences in an appropriate case.[63] Nothing in *Monell* or the legislative history of section 1983 suggests any intent to strip federal juries of their established authority to decide whether or

[62]Counsel for petitioner stated, somewhat opaquely, "we make a second objection, your honor, particularly to the one, the Oklahoma City language, the language in the light of the City of Oklahoma City, which is the single occurrence language." (Tr. 693). While this appears to be a reference to the instruction quoted in note 61, *supra*, it is less clear which portion of the instruction was regarded as objectionable. More seriously, the quoted objection simply contained no explanation of the ground of petitioner's objection, and thus was not "sufficiently specific to bring into focus the precise nature of the alleged error." *Palmer* v. *Hoffman*, 318 U.S. 109, 119 (1943). Even in this Court the nature of petitioner's contentions remains less than clear.

[63]Chief Justice Erle observed in 1865:

> "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant . . . and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence . . . that the accident arose from want of care."

Scott v. *London & St. Katherine Docks Co.*, 3 H. & C. 596, 159, Eng. Rep. 665 (1865). Certainly it is possible that the specific circumstances of a particular constitutional violation may be "such as in the ordinary

not the specific circumstances of an injury warranted any conclusions as to its cause. See *Scheuer* v. *Rhodes*, 416 U.S. 232, 243-44 (1974).

Since this is not a case in which plaintiff introduced no evidence other than proof of a constitutional violation, any erroneous implications in the instruction with regard to such a case was irrelevant. *Hopper* v. *Evans*, 456 U.S. 605 (1982). Here neither counsel referred in his opening or closing statements to any inferences that might be drawn from the Tuttle killing itself, and the jury's decision regarding official action and causation was doubtless based on the substantial direct evidence adduced with regard to those issues. Under these circumstances, the trial court's instructions regarding any inference to be drawn from the Tuttle killing could have had no more than "an inconsequential impact on the jury's decision regarding" municipality. *Zant* v. *Stephens*, 77 L.Ed.2d 235, 257 (1983).

Petitioner closes its brief with a plea that this Court consider "the citizens of the municipality, who bear the financial burden of the judgment through taxation." (P.Br. 22). But the verdict of which petitioner here complains was rendered by those very taxpayers, men and women who were certainly aware of the ultimate source of municipal funds, but who may have been more concerned about the dangers they faced if the city failed to improve its

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[23] (Continued)

course of things do not happen" except as a result of governmental policies. *See Turpin* v. *Mailet*, 619 F.2d 196, 202 (2d Cir. 1980); *Owens* v. *Haas*, 601 F.2d 1242, 1246 (2d Cir. 1979), *cert. denied, sub. nom. County of Nassau* v. *Owens*, 444 U.S. 980 (1979). Whether a particular cas presents such circumstances is a matter for the jury.

training and supervision policies. Petitioner contended at trial that it had done all that could reasonably be asked to guide its police officers in the use of deadly force; the jury found otherwise. Petitioner now urges that by overturning that verdict, rendered by a jury selected from a cross section of Oklahomans, this Court would somehow vindicate "the theory that the people are the ultimate sovereign." (P.Br. 22). The logic of this argument is far from apparent. In finding for respondent, the members of the jury placed the community's interest in the vigorous enforcement of the Constitution ahead of the city's interest in saving money. That is precisely the choice which the framers of the Seventh Amendment contemplated would occur, and it is a choice with which this Court should not interfere.

CONCLUSION

For the foregoing reasons the decision of the court of appeals should be affirmed.

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